

JUN 28 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

GABRIEL LOUIS HERNANDEZ,

Petitioner - Appellant,

v.

DAVID L. RUNNELS, Warden,

Respondent - Appellee.

No. 03-57190

D.C. No. CV-03-04839-RJT

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Robert J. Timlin, Senior Judge, Presiding

Argued and Submitted June 6, 2006
Pasadena, California

Before: D.W. NELSON, RAWLINSON, and BEA, Circuit Judges.

Gabriel Louis Hernandez appeals the district court's denial of his habeas petition, arguing that the district court incorrectly failed to offer Hernandez the "stay and abeyance" option.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1. Because Hernandez did not present a mixed petition to the court in his first federal habeas proceeding, the district court was not required to dismiss. *See Rose v. Lundy*, 455 U.S. 509, 510, 522 (1982). Accordingly, no stay and abeyance considerations arose. *See Jefferson v. Budge*, 419 F.3d 1013, 1016 (9th Cir. 2005) (recognizing that the stay and abeyance is appropriate when a court is presented with a mixed petition). As the district court did not affirmatively mislead Hernandez, he is not entitled to equitable tolling. *See Brambles v. Duncan*, 412 F.3d 1066, 1070 (9th Cir. 2005).

2. Because we find that Hernandez is not entitled to equitable tolling, we need not address the issue of statutory tolling, as the resolution of that issue would not affect the outcome of the case.

3. We decline to expand the certificate of appealability to include the uncertified claim because that claim essentially restates Hernandez's ultimately unsuccessful equitable tolling argument.

AFFIRMED.